

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

DOUGLAS L. TOOLEY,

Petitioner,

v.

GOVERNOR CHRISTINE GREGOIRE AND
CITY OF SEATTLE,

Respondents.

CASE NO. 11-3-0006

(Tooley)

ORDER OF DISMISSAL

This matter came before the Board at a Prehearing Conference conducted telephonically March 29, 2011 pursuant to a Notice of Hearing issued on March 7. Board members Margaret Pageler (presiding officer), David Earling and William Roehl were present. Respondent City of Seattle was represented by Eleanore Baxendale. Respondent Governor Gregoire was represented by Stephen Klasinski. Petitioner Douglas Tooley failed to appear.¹

At the Prehearing Conference the Board had before it the Petition for Review, the Answer of Governor Christine Gregoire, and the Preliminary Index of City of Seattle. Based on these documents the Board on its own motion dismisses this case as prematurely filed.

The Petition for Review challenges the "Alaskan Way Viaduct Replacement SEIS-Final" and acknowledges that the challenge is "filed in advance of publication."² The State's Answer indicates: "The final SEIS has not been issued or published at this time."³ The City's

¹ As stated in the Notice of Hearing, WAC 242-02-710 provides that a party's failure to attend or participate in the Board's adjudicative proceedings is grounds for an order of default. However, the Board dismisses this case on other grounds.

² Petition for Review, Feb. 24, 2011, at 1.

³ Answer of Governor Christine Gregoire, Mar. 21, 2011, at 2.

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April 1, 2011

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1 Preliminary Index of Record references the Draft SEIS and public comments but states: “No
2 final document has issued.”⁴ The Board therefore finds the Final SEIS for the Alaskan Way
3 Viaduct Replacement has not yet been issued.

4
5 The Board’s jurisdiction is limited by statute.⁵ RCW 36.70A.290(2) provides that a petitioner
6 must allege that an *adopted* comprehensive plan, development regulation, or permanent
7 amendment thereto, is not in compliance with the GMA, SMA or SEPA. Thus the Board has
8 uniformly held that *preliminary* planning documents are not ripe for review.⁶
9

10 The Board may dismiss a matter *sua sponte* when lack of jurisdiction is apparent.⁷ In the
11 present case, the Board finds the SEIS for the Alaskan Way Viaduct Replacement is not
12 ripe for review. The Board therefore concludes it has no jurisdiction to hear the petition and
13 the petition must be dismissed.⁸
14

15 ORDER

16
17 Based upon review of the Petition for Review, the GMA and case law, and having
18 deliberated on the matter, the Board ORDERS:

- 19 • Case No. 11-3-0006, *Douglas Tooley v. Governor Christine Gregoire and City of*
20 *Seattle* is **dismissed**.
21

22 ⁴ Preliminary Index of Record, Mar. 28, 2011, at 1.

23 ⁵ RCW 36.70A.280. See *Wenatchee Sportsman Ass’n v. Chelan County*, 141 Wn.2d 169, 178, 4 P.3d 123
24 (2000); *Woods v. Kittitas County*, 162 Wn.2d 597, 609, 174 P.3d 25 (2007).

25 ⁶ *Open Frame v. City of Tukwila*, CPSGMHB Case No. 06-3-0028, Order of Dismissal (Nov. 17, 2006), at 4-7
26 (preliminary steps to siting transit center are not a reviewable final action); *City of Lake Stevens v. City of*
27 *Snohomish*, CPSGMHB Case No. 09-3-0008, Order on Motions (Jul. 6, 2009) (resolution instructing city staff
28 to prepare comprehensive plan amendments is not a reviewable final action).

29 ⁷ *Kent Cares v. Puget Sound Regional Council*, CPSGMHB Case No. 04-3-0011, Order of Dismissal (Apr. 19,
30 2004) (summary dismissal of challenge to PSRC “Policy Framework for the PSRC’s Project Selection
31 Process”); *Fallgatter II v. City of Sultan*, CPSGMHB Case No. 05-3-0008, Order of Dismissal (Mar. 8, 2005)
32 (following prehearing conference, petition dismissed as not timely filed).

⁸ Additionally it appears Mr. Tooley may not have standing to challenge the SEIS. The City’s Index indicates
the SEIS comment period closed on December 13, 2010, and the PFR claims participation standing based on
comments filed by Mr. Tooley February 19, 2011. The SEPA Rules at WAC 197-11-545(2) provide: “Lack of
comment ... within the time period specified ... shall be construed as lack of objection.” A petitioner who failed
to make timely SEPA comment is subject to dismissal for lack of standing. *Shoreline et al v. Snohomish*
County, Coordinated Case Nos. 09-3-0013c and 10-3-0011c, Order on Dispositive Motions (Jan 18, 2010), at
6-7.

1 DATED this 1st day of April, 2011.

2
3 _____
4 Margaret A. Pageler

5
6 _____
7 David O. Earling

8
9 _____
10 William Roehl

11
12
13 Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party
14 files a motion for reconsideration pursuant to WAC 242-02-832.⁹
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17
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21 _____

22 ⁹ Pursuant to RCW 36.70A.300 this is a final order of the Board.

23 Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to
24 file a motion for reconsideration. The original and four copies of a motion for reconsideration, together with any
25 argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original
26 and four copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of
27 record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240,
WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial
review.

28 Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as
29 provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior
30 court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement.
31 The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the
32 Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW
34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means
actual receipt of the document at the Board office within thirty days after service of the final order. A petition for
judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)